STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2004
v	No. 244656 Wayne Circuit Court
ORRIN A. FIELDS, Defendant-Appellant.	LC No. 00-006574-01

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a bench trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court initially sentenced defendant to one-and-one-half to four years in prison, with 245 days of credit, for the felonious assault conviction and to two years in prison for the felony-firearm conviction. Defendant moved to correct the sentence, and the court resentenced defendant to one to four years in prison, with sixty-nine days of credit, for the felonious assault conviction and to two years in prison, with 730 days of credit, for the felony-firearm conviction. We affirm the convictions but remand for resentencing with respect to the felonious assault conviction.

Defendant first contends that the trial court erred in convicting him of felonious assault because it was not a charged offense and was not a necessarily included lesser offense of the charged offense, assault with intent to murder. Whether an offense is a lesser-included offense of another is a question of law that this Court reviews de novo. See *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

MCL 768.32(1) provides, in pertinent part:

> [U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

In *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002), the Supreme Court ruled that the language of this statute only allows consideration of those uncharged offenses that are

inferior to the greater, charged offense. Inferior offenses are those that are necessarily included in the greater offense, meaning that all elements of the lesser offense are included in the greater. *Mendoza*, *supra* at 532-533. Cognate lesser offenses, on the other hand, share several of the same elements of the greater offense but have elements not found in the greater. *Id*. at 532 n 4. Therefore, under MCL 768.32(1), as interpreted by *Cornell*, *supra* at 354-357, courts may not convict a defendant of an uncharged cognate lesser offense. See also *Mendoza*, *supra* at 532-533.

The elements constituting felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of assault with intent to murder are: "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999), quoting *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Given that felonious assault contains at least one element not included in assault with intent to murder (a dangerous weapon), it is a cognate lesser offense. *Mendoza*, *supra* at 532 n 4. Therefore, if we were to apply the rationale of *Cornell*, we would conclude that the trial court improperly convicted defendant of felonious assault. *Cornell*, *supra* at 354-357; see also *Mendoza*, *supra* at 532-533.

However, the *Cornell* Court specifically indicated that "[o]ur decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." *Cornell*, *supra* at 367. See also *People v Phillips*, 470 Mich 894, 894; 683 NW2d 597 (2004) ("[o]ur decision in [*Cornell*] applies only to cases pending on appeal in which the issue has been raised and preserved, and to cases arising after *Cornell*"). We must decide whether *Cornell* applies retroactively to the instant case.

We first note that the trial in the instant case occurred in May 2002, and *Cornell* was decided on June 18, 2002. Therefore, this case did not "aris[e] after *Cornell*." *Phillips*, *supra* at 894.[1] The pertinent question, then, is whether, on June 18, 2002, this case constituted a "case[] pending on appeal in which the issue has been raised and preserved." *Id.* Although the instant case was not truly "pending on appeal" at the time of the *Cornell* decision (because defendant did not file his claim of appeal until after June 18, 2002), the phrase "pending on appeal" arguably encompasses cases that have been tried and that are *about to be appealed.* Nevertheless, regardless of whether the case was "pending on appeal" at the time *Cornell* was decided, it is clear that the issue of being improperly convicted of a cognate lesser offense was not "raised and preserved" in the instant case. Defendant did not object to the trial court's convicting him of the cognate lesser offense of felonious assault either during or after the trial court's findings. While it is not entirely clear to us *why* the Supreme Court established the preservation requirement in *Cornell* (indeed, it seems illogical that a defendant would have objected to being convicted of a cognate lesser offense if such a conviction was allowable under existing case law), we are nonetheless bound to follow precedent established by our Supreme

[1] Contrary to defendant's implication in a supplemental brief, *Phillips* does not state that *Cornell* applies to *appeals* arising after *Cornell*. See *Phillips*, *supra* at 894.

Court. Because the issue concerning the conviction of a lesser offense was not "raised and preserved" in this case, *Cornell* is inapplicable.[2]

Because *Cornell* does not apply to this case, the trial court's convicting defendant of the cognate lesser offense of felonious assault was proper as long as the evidence supported the lesser charge. See *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). The evidence did indeed support the lesser charge, given the testimony that defendant pulled a revolver out of the waistband of his pants, pointed it at another man, Steven Hopkins, and fired it. Reversal of defendant's felonious assault conviction is unwarranted.

Defendant next argues that he must be resentenced with respect to the felonious assault conviction because the trial court departed from the guidelines range without stating substantial and compelling reasons for the departure as required by MCL 769.34(3). See *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). Whether the court failed to state reasons for a departure from the sentencing guidelines presents a question of law. We review questions of law de novo. *People v Green*, 260 Mich App 392, 405-406; 677 NW2d 363 (2004).

MCL 769.34(4) states, in part:

> (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court *shall* impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [Emphasis added.]

MCL 769.31(b) states:

> "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:
>
> (i) Inpatient or outpatient drug treatment.
>
> (ii) Probation with any probation conditions required or authorized by law.
>
> (iii) Residential probation.
>
> (iv) Probation with jail.
>
> (v) Probation with special alternative incarceration.

[2] Although the prosecutor concedes on appeal that *Cornell* requires reversal in this case, we are not bound by this concession. See *People v Reed*, 449 Mich 375, 395; 535 NW2d 496 (1995).

(vi) Mental health treatment.

(vii) Mental health or substance abuse counseling.

(viii) Jail.

(ix) Jail with work or school release.

(x) Jail, with or without authorization for day parole . . . .

(xi) Participation in a community corrections program.

(xii) Community service.

(xiii) Payment of a fine.

(xiv) House arrest.

(xv) Electronic monitoring.[3]

In the absence of a substantial and compelling reason for imposing a different sentence, defendant required an intermediate sanction, because the upper limit of his recommended minimum sentence range was less than eighteen months. Indeed, the parties agree that defendant's guidelines range as scored was zero to seventeen months.

The trial court departed from the required intermediate sanction by sentencing defendant to one to four years in prison, but the trial court gave no identifiable reason for this departure. While the court did state that the crime involved "excessive brutality," it is simply unclear from the record which factors the court considered "excessive" and whether this "excessive brutality" was the reason for the trial court's departure from the guidelines. Accordingly, given that the court stated no identifiable, substantial and compelling reason on the record for its departure from the sentencing guidelines, this Court must remand the matter for resentencing. MCL 769.34(11); see also *Babcock*, *supra* at 268 (stating that "the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case"). The prosecutor concedes error and concurs with this remedy.

Defendant next argues that the guidelines range for his felonious assault conviction was too high because two offense variable (OV) scores were miscalculated. Specifically, defendant objects to the scoring of OV 7 (aggravated physical abuse, see MCL 777.37)[4] and OV 3 (physical injury to a victim, see MCL 777.33). Although we have already concluded that resentencing is appropriate, the scoring issue is germane to the remand and we therefore will address it. We review for an abuse of discretion issues concerning the proper scoring of

[3] We note that the recent amendment to MCL 769.31 does not take effect until 2005.

[4] This Court must use the version of MCL 777.37 in effect at the time the offense was committed, May 10, 2000. See MCL 769.34(2).

sentencing guidelines variables. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).[5]

Defendant received fifty points for OV 7. A defendant was to receive fifty points under the previous version of OV 7 if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." See former MCL 777.37(1)(a). The statute defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." Former MCL 777.37(2)(a). The statute defined "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the defendant's gratification." Former MCL 777.37(2)(b).

We conclude that the evidence supported the fifty-point score for OV 7. Indeed, Hopkins's testimony established that, after defendant initially fired the gun towards him, he (Hopkins) turned and ran. He then heard another shot. He continued running, changed his direction and headed back toward the scene of the first shot,[6] and then saw defendant approaching him again, "walking fast" and with his "hands under his shirt." As defendant approached him, Hopkins ran into a street and was struck by a vehicle. Hopkins stated that defendant instructed the driver of the vehicle to get back into her car and stated, "f--- him, leave . . . [l]eave him, leave the scene, f--- him." Moreover, although his memory was unclear and his testimony somewhat contradictory on this point, Hopkins stated that he "believe[d]" he could "hear him, see him, see[] [defendant] kicking and spitting on me" after he was struck by the vehicle. The evidence as a whole showed that defendant's conduct was "designed to substantially increase the fear and anxiety [Hopkins] suffer[ed] during the offense." Former MCL 777.37(2)(a). No error occurred with respect to the scoring of OV 7.

Defendant received twenty-five points for OV 3 because of "[l]ife threatening or permanent incapacitating injury occurr[ing] to a victim." See former MCL 777.33(b), now MCL 777.33(c). He contends that, instead, he should have received ten points for "bodily injury requiring medical treatment." See former MCL 777.33(1)(d), now MCL 777.33(1)(c).

We need not address defendant's allegation of error with respect to OV 3 because, even assuming that the error did occur, it would be deemed harmless. Indeed, a lowering of the OV 3 score by fifteen points would lower defendant's total OV points from 115 to one-hundred. Defendant had zero Prior Record Variable (PRV) points. Felonious assault is a crime against a person in class F under the sentencing guidelines. MCL 777.16d. Under MCL 777.67, a defendant who commits a class F crime and who has a PRV of zero and an OV of one-hundred falls within the calculated guidelines range of zero to seventeen months, the same range produced using the earlier scoring. The alleged error in scoring OV 3 is thus deemed harmless. See, generally, *People v Johnson* 202 Mich App 281, 290; 508 NW2d 509 (1993).

[5] We note that defendant preserved his objections to the scoring as required by MCR 6.429(C).

[6] Hopkins stated that he headed back to the scene of the first shot because he was afraid defendant would take a shortcut through an alley in order to "cut [him] off."

Defendant's convictions are affirmed but this case is remanded for resentencing We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter